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IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1998

In the Interest of: J.F., a Minor,
J.F.,

Petitioner

v.

COMMONWEALTH OF PENNSYLVANIA,
Respondent

On Petition for a Writ of Certiorari to the
Superior Court of Pennsylvania, Harrisburg

PETITION FOR WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED

I Whether, in light of this Court's failure to articulate a majority rationale for its plurality decision in McKeiver v. Pennsylvania that juries were not constitutionally required in juvenile delinquency proceedings, this Court must now reexamine McKeiver 's analysis of fundamental fairness in juvenile court, in order to provide guidance to state and federal courts that are routinely asked to apply this Court's constitutional doctrine to the changing realities of the modern day juvenile court, but feel bound by the limitations of McKeiver?

II Whether, accepting *arguendo* the Blackmun-White rationale as the holding of McKeiver v. Pennsylvania, McKeiver is still constitutionally tenable when it was premised on an idealized vision of the juvenile court that is no longer accurate, and where Pennsylvania and other states throughout the country have largely dismantled the protective features of the historic juvenile court to establish instead a court driven by traditional criminal justice aims of retribution, accountability, and deterrence?

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PETITION FOR WRIT OF CERTIORARI AND APPENDIX

Petitioner J.F. respectfully requests that a Writ of Certiorari issue to review the Pennsylvania Superior Court's decision (review denied, Pa. Supreme Court, December 17, 1999) which holds that Pennsylvania's statutory denial of the right to jury trial to juveniles charged with certain designated felonies under Pennsylvania's Juvenile Act does not violate the Fourteenth Amendment's due process requirement of fundamental fairness in juvenile delinquency proceedings.

OPINION BELOW

The decision of the Pennsylvania Supreme Court denying J.F.'s Petition for Allowance of Appeal is reported at 1998 Pa. Super. LEXIS 1017 (Pa. Super. December 17, 1998) (per curiam), and is reproduced at 1a. The order and opinion of the Pennsylvania Superior Court is reported at 714 A.2d 467 (Pa. Super. 1998), and is reproduced at 2a. The order and opinion of the Court of Common Pleas of Dauphin County, Family Division, in the delinquency matter pertaining to J.F. is unreported, and reproduced at 16a.

JURISDICTIONAL STATEMENT

The Pennsylvania Supreme Court entered its judgement on December 17, 1998. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1:

> [N]or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

Pennsylvania Statutes, 42 Pa. Cons. Stat. § 6341(a):

> After hearing the evidence on the petition the court shall make and file its findings as to whether the child is a . . . delinquent.

STATEMENT OF THE CASE

J.F. was fifteen years old when the Commonwealth of Pennsylvania ("Commonwealth") filed a delinquency petition against him alleging Rape, Involuntary Deviate Sexual Intercourse and Aggravated Indecent Assault based solely upon the uncorroborated report of a fifteen-year-old girl. In a pre-trial motion requesting a jury trial, J.F. asked the trial court to determine that Pennsylvania's Juvenile Act, 42 Pa. Cons. Stat. § 6301 et seq., denying trial by jury in juvenile delinquency cases, violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court denied the motion. Subsequently, the judge, sitting as the sole fact-finder, found J.F. delinquent of Involuntary Deviate Sexual Intercourse, and committed him to a secure treatment program for sexual offenders.

The Pennsylvania Superior Court affirmed (review denied, Pa. Supreme Court, December 17, 1999), holding that despite extensive amendments to the Juvenile Act of Pennsylvania, which substantially altered the purpose and character of the juvenile court, the Fourteenth Amendment's concept of fundamental fairness does not require that J.F. be afforded the right to a jury trial.

A. Allegations Against J.F.

This case involves the trial of a minor charged with a serious offense, his adjudication of delinquency, and the imposition of criminal-like measures of responsibility and accountability. A review of this matter -- whether J.F.'s adjudication of delinquency was fundamentally fair -- is aided by an understanding of the trial testimony at which the Commonwealth failed to present any evidence that the alleged offense was anything more than a dream by the victim, where the victim did not see her alleged attacker, and where there was no physical evidence of intercourse.

On February 2, 1997, J.F. was residing in the home of Donald Mummert, Sr., along with his wife, his step-daughters, fifteen-year-old H.P. and her sister Sarah, and Mr. Mummert's two children, Casey and Matt. That evening, H.P.'s mother was at the hospital with Sarah, who was about to have a baby, and H.P.'s

step-father was in the downstairs portion of the house where he slept. Between approximately 9:00 and 9:30 p.m., H.P., Casey, Matt, and J.F. were in H.P.'s upstairs bedroom. After talking, listening to music, and playing "Truth or Dare" for a while, Matt climbed to the top bunk and H.P. fell asleep on the bottom bunk. J.F., who regularly slept downstairs, left the room and Casey joined Matt in the top bunk to sleep.

At some point during the night, according to her testimony on direct examination, H.P. felt rubbing and squeezing on her breasts. H.P. further testified that she felt "somebody putting their penis in [her] butt." When questioned by the trial court as to who was touching her, H.P. identified J.F. as the perpetrator.

However, on cross-examination, H.P. provided the following unsolicited information:

Q: "So you guys all went to bed?"

A. "Yeah, and I was asleep and I had a dream somebody was like sticking his penis in my butt."

H.P. proceeded to testify that she dreamed of rubbing someone's penis. She reiterated that this was merely a dream and that she did not wake up. It was during the dream that she experienced the anal intercourse. H.P. only woke when she rolled off the bed onto the floor. At no point during H.P.'s dream did she see anyone, including J.F., on the bed with her.

On February 4, H.P. told her mother what J.F. had allegedly done to her, and her mother was understandably upset. However, the police were not brought in to investigate or speak with H.P. until another three days later (February 7.)

On the same day that H.P. and her mother called the police, they also went to the hospital emergency room. H.P. was examined by a fully certified physician's assistant who conducted a rectal examination of H.P. based upon her complaint of anal rape. H.P. exhibited no tears or lacerations of the rectum, no indications of bleeding or presence of dry blood, and no reports of pain or palpitation to the rectum, all of which are common indicators of anal penetration.

On February 8, 1997, six days after the alleged encounter, J.F. was arrested, and a juvenile petition alleging Rape, Involuntary Deviate Sexual Intercourse, and Aggravated Indecent Assault was filed on February 10, 1997.

B. Proceedings Below

J.F. filed a pre-trial motion for a jury trial in juvenile court, in which he asked the trial court to determine that Pennsylvania's Juvenile Act, 42 Pa. Cons. Stat. § 6301 et seq., denying trial by jury in juvenile delinquency cases, violated the Due Process Clause of the Fourteenth Amendment of the United States Constitution. The court denied the motion immediately preceding the adjudication hearing. The case was tried to a judge, sitting as the sole fact-finder.

The court issued an order adjudicating J.F. delinquent and finding that J.F. had committed Involuntary Deviate Sexual Intercourse. Following a disposition hearing, J.F. was committed to a secure residential treatment program for sexual offenders. Due to changes in the Juvenile Act, dispositions for delinquent offenders must emphasize balanced attention to protection of the public and accountability of the offender. An additional consequence of changes to the Juvenile Act is that J.F.'s adjudication exposes J.F. to direct prosecution as an adult in the criminal justice system should J.F. be arrested and charged with any one of these same designated felonies before he turns eighteen.

J.F. appealed his delinquency adjudication to the Pennsylvania Superior Court, arguing that 42 Pa. Cons. Stat. 6301 et seq., denied his state and federal constitutional rights to due process.[1] The Superior Court rejected each of J.F.'s constitutional claims. The three judge panel relied on this Court's decision in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), as the basis for its conclusion that denying children the right to be tried by a jury in delinquency proceedings was constitutional so long as the juvenile justice system provides some measure of rehabilitation. In fact, the court ruled that McKeiver was controlling precedent.

J.F. subsequently filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which denied review on December 17, 1998.

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J.F. also challenged the sufficiency of the evidence to sustain his adjudication of delinquency. The Superior Court held the evidence was sufficient to sustain the trial court's adjudication.

REASONS THE COURT SHOULD GRANT A WRIT OF CERTIORARI

For nearly three decades, since this Court's plurality decision in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), that the Fourteenth Amendment's concept of fundamental fairness does not require the extension of the Constitutional right to jury trial to juveniles charged with delinquent acts, youth subject to the jurisdiction of the juvenile court have been a Constitutional underclass. This Constitutional underclass of youth suffers daily the same stigma of criminal accusation, public opprobrium, loss of liberty, and separation from family and community as adult offenders. Yet, they remain to this day the sole class of persons in our society who are charged with criminal misconduct, but nevertheless denied what Thomas Jefferson called "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."[2]

The McKeiver decision represents a blight on this Court's otherwise forward progress toward constitutionalizing the juvenile court, as reflected in the series of cases decided by the Court between 1966-1970 in which it sought to strike a balance between preserving the informal and protective spirit of the original juvenile court while also heeding the demands of the Constitution when individual liberty is at stake.[3] This step backwards is compounded by the plurality's failure to articulate a shared rationale that could sensibly guide the lower courts' adaptation of McKeiver to the radically transformed institution that is the current juvenile court. As a consequence, while state legislatures have forged a modern juvenile court unrestrained by traditions of the past, state and lower federal courts have stood largely mute in

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Letter From Thomas Jefferson to Thomas Paine (July 11, 1789), in 3 The Writings of Thomas Jefferson 71 (H.A. Washington, ed. 1859).

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Beginning with its decision in Kent v. United States, 383 U.S. 541 (1966), this Court extended due process protections to juveniles threatened with prosecution in adult court, to In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970), this Court extended to juveniles most of the procedural due process protections constitutionally required in adult criminal proceedings.

the face of these sweeping changes, constrained by a twenty-eight-year-old ruling of this Court that they are powerless to undo. Unfortunately, the gulf between legislative reality and constitutional myth fostered by this Court's uncertain ruling in McKeiver will only widen, as state legislatures show no signs of limiting their abandonment of the central tenets of the original juvenile court.

In 1971, this Court approached the constitutional question presented in McKeiver with halting steps and hesitant will. While fully aware that the juvenile court even then had fallen far short of its promise to spare youth the harsh consequences of the criminal justice system, a plurality of this Court nevertheless withheld further constitutional protection, rather than let go of its idealized vision of the juvenile court. The price of this Court's hesitation has been high. More than a generation of youth have been hamstrung in their ability to obtain equal justice, while the lines between the juvenile and adult criminal justice systems have been all but obliterated.

This is not the first time in the last twenty-eight years that this Court has been asked to reexamine McKeiver. But with each new legislative blow at the protective shield of the juvenile court, the lower courts' need for clear guidance from this Court becomes increasingly urgent. Whatever promise the original juvenile court may have held, it must now give way to the promise of "fundamental fairness" that the Fourteenth Amendment guarantees to all members of our society. The national movement to reform the juvenile court has also led that court to the brink of a constitutional crisis. As the juvenile court approaches its 100th anniversary, the day has come for this Court to restore the Constitutional equilibrium between that Constitutional promise and the reality of the modern day juvenile court.

I. McKEIVER v. PENNSYLVANIA, A PLURALITY DECISION WITH NO MAJORITY RATIONALE, DOES NOT CONCLUSIVELY RESOLVE WHETHER JURY TRIALS ARE CONSTITUTIONALLY REQUIRED IN JUVENILE DELINQUENCY PROCEEDINGS; WITH A NATIONAL MOVEMENT UNDERWAY TO FURTHER CRIMINALIZE THE JUVENILE COURT, STATE COURTS REQUIRE GUIDANCE FROM THIS COURT REGARDING THE FULL SCOPE OF FOURTEENTH AMENDMENT DUE PROCESS IN JUVENILE PROCEEDINGS

In McKeiver v. Pennsylvania, this Court, in a plurality decision, halted its expanding application of due process requirements to juvenile proceedings by declining to hold the Fourteenth Amendment required jury trials in juvenile court. The decision, however, lacked a majority rationale and cannot stand as the definitive resolution of this question.

This Court's three decisions prior to McKeiver -- Kent v. United States, 383 U.S. 541 (1966), In re Gault, 387 U.S. 1 (1967), and In re Winship, 397 U.S. 358 (1970) -- established "fundamental fairness" as the touchstone for Fourteenth Amendment analysis of juvenile proceedings. See Kent v. U.S., 383 U.S. 541 (1966) (holding that due process requirements apply to waiver proceedings); In re Gault, 387 U.S. 1 (1967) (holding that juveniles have right to notice of charges, right to counsel, privilege against self-incrimination, and right to confrontation and cross-examination); In re Winship, 397 U.S. 358 (1970) (holding that fundamental fairness requires proof beyond a reasonable doubt in delinquency adjudications). As this Court stated in Kent, juvenile proceedings, although not necessarily identical to adult criminal trials or even administrative hearings, nonetheless "must measure up to the essentials of due process and fair treatment." Kent, 383 U.S. at 562.

Gault extended this requirement of fundamental fairness to juvenile delinquency adjudications. Gault, 387 U.S. at 30-31. There the Court found that, because delinquency adjudications can result in loss of liberty and institutional confinement, "it would be

extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.'" Gault, 387 U.S. at 27-28. Moreover, this Court has made clear that:

> [C]ivil labels and good intentions do not themselves obviate the need for criminal due process safeguards in juvenile courts, for "[a] proceeding where the issue is whether the child will be found to be 'delinquent' and subject to the loss of his liberty for years is comparable in seriousness to a felony prosecution."

Winship, 397 U.S. at 365-66 (quoting Gault, 387 U.S. at 36).

One year after Gault was decided, this Court held that the Sixth Amendment right to trial by jury in all criminal prosecutions was incorporated through the Due Process Clause of the Fourteenth Amendment and applied to the states. See Duncan v. Louisiana, 391 U.S. 145 (1968). However, in McKeiver v. Pennsylvania, 403 U.S. 528 (1971), this Court, in a plurality opinion, stopped short of extending the right to jury trial to juveniles during the adjudicatory hearing.

In the opinion announcing the judgment of the Court, Justice Blackmun, joined by Chief Justice Burger and Justices White and Stewart, found that extension of the jury trial right to juveniles was not required by fundamental fairness, unless the Court were to "equate the juvenile proceeding -- or at least the adjudicative phase of it -- with the criminal trial." McKeiver, 403 U.S. at 550. Justice Blackmun declined to equate the two, asserting it would ignore "every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." McKeiver, 403 U.S. at 550. Further, in Justice Blackmun's view, jury trials would impose on the juvenile court "the traditional delay, the formality, and the clamor of the adversary system and, possibly, the public trial," id., without any countervailing benefit to the juvenile court's fact-finding function. Id. at 547.

In his concurrence, Justice White expanded on the prevailing view of the juvenile court at that time. According to

Justice White, the benevolent nature of the juvenile court was premised upon the important distinction between adult criminals who were deemed "blameworthy" and juvenile offenders whose reprehensible acts "[were] not deemed the consequence of mature and malevolent choice but of environmental pressures (or lack of them) or of other forces beyond their control." McKeiver, 403 U.S. at 552. For Justice White, the "deterministic assumptions" of the juvenile justice system meant that the system did not "stigmatize the juvenile delinquent by branding him a criminal; his conduct is not deemed so blameworthy that punishment is required to deter him or others." Id. Consequently, Justice White concluded that for juvenile offenders "[c]oercive measures, where employed, are considered neither retribution nor punishment." Id. Justice White continued:

> Supervision or confinement is aimed at rehabilitation, not at convincing the juvenile of his error simply by imposing pains and penalties. Nor is the purpose to make the juvenile delinquent an object lesson for others, whatever his own merits or demerits may be. Nor is the authorization for custody . . . any measure of the seriousness of the particular act that the juvenile has performed. (emphasis added)

Id.

Based on his belief that treatment, not punishment, of children was the primary objective of the juvenile justice system, and his understanding that "the consequences of adjudication [in juvenile court] are less severe than those flowing from verdicts of criminal guilt," id. at 553, Justice White agreed that juries were not constitutionally required in delinquency proceedings.

The concurring opinions of Justices Harlan and Brennan in McKeiver -- at least one of which was necessary to establish a five-justice majority -- were each based on other grounds. Justice Harlan concurred in the judgment because of his underlying belief that Duncan v. Louisiana, 391 U.S. 145 (1968), wrongly extended the right to trial by jury to state proceedings. In fact, Justice Harlan stated that if he were to accept Duncan as good law, then he "did not see why, given Duncan, juveniles as well as adults

would not be constitutionally entitled to jury trials, so long as juvenile delinquency systems are not restructured to fit their original purpose." McKeiver, 403 U.S. at 553.

Justice Brennan, on the other hand, concurring in part and dissenting in part, concluded that a juvenile's right to trial by jury depended on whether that juvenile was afforded the right to a public trial. Therefore, Justice Brennan concurred with respect to the Pennsylvania case (because Pennsylvania law at that time could be read to afford juveniles the right to a public trial), and dissented with respect to the North Carolina case (because North Carolina required closed proceedings).

While Justice Blackmun's opinion in McKeiver has generally been cited as the opinion of the Court, the plurality opinions actually share no common rationale. In other contexts, this Court has asserted that the holding of a plurality opinion is the narrowest ground as to which an agreement among five justices can be inferred. Marks v. U.S., 430 U.S. 188, 193 (1977) (expanding on and quoting Gregg v. Georgia, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds .'") Because neither Justice Harlan's nor Justice Brennan's opinions adopt the rationale of Justice Blackmun's opinion, the McKeiver plurality stands for no more than the judgment of the Court.

Consequently, because no holding can be discerned from the McKeiver plurality, the decision does not definitively answer whether fundamental fairness requires that J.F. be accorded the right to trial by jury. Notwithstanding the limited precedential reach of McKeiver, however, the lower court here, as well as other state and federal courts nationwide, have generally read McKeiver to foreclose further constitutional challenges to the denial of jury trials to juveniles.[4] Without proper guidance from this Court

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[4] See, e.g., United States ex rel. Murray v. Owens, 465 F.2d 289 (2nd Cir. 1972); United States v. Hill, 538 F.2d 1072 (4th Cir. 1976); Raines v. Alabama, 552 F.2d 660 (5th Cir. 1977); United States v. King, 482 F.2d 454 (6th Cir. 1973);

clarifying a juvenile's right to jury trial, state courts will remain frozen in 1971, despite the dramatic changes made to the juvenile court since then. The time has come for this Court to finally resolve this critical constitutional issue.

II. ASSUMING *ARGUENDO* THE BLACKMUN-WHITE RATIONALE REPRESENTS THE HOLDING OF THE McKEIVER COURT, McKEIVER'S RULING IS NO LONGER CONSTITUTIONALLY TENABLE WHERE IT IS PREMISED ON A VIEW OF THE JUVENILE COURT THAT IS NOT ACCURATE TODAY

The McKeiver plurality held that the Fourteenth Amendment's concept of fundamental fairness did not require the extension of the right to jury trial to delinquency proceedings, based on the prevailing view of the juvenile court in 1971 as a rehabilitative and therapeutic institution where a "stalwart, protective" juvenile court judge presided over an "intimate, informal protective proceeding." McKeiver, 403 U.S. at 544, 545. Believing that these features of the juvenile court sufficiently distinguished it from the adult criminal system, the McKeiver plurality concluded that a jury was not necessary either to enhance fact-finding or to serve as a buffer against government oppression in delinquency proceedings.

In the twenty-eight years since McKeiver was decided, however, Pennsylvania, along with dozens of other states nationwide, has incorporated principles of punishment and accountability into its juvenile code -- the basic hallmarks of the adult criminal justice system. Where the McKeiver Court

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United States v. Juvenile Male C.L.O., 77 F.3d 1075 (8th Cir. 1996); United States v. James, 464 F.2d 1228 (9th Cir. 1972); United States v. Duboise, 604 F.2d 648 (10th Cir. 1979); Valdez v. State, 801 S.W.2d 659 (Ark. Ct. App. 1991); In the Interest of T.M., 742 P.2d 905 (Col. 1987); Upham v. McElligott, 956 P.2d 179 (Ore. 1998); State of Washington v. Lawley, 591 P.2d 772 (Wash. 1979); United States v. D.F., 857 F. Supp. 1311 (E.D. Wis. 1994); Wisconsin v. Hezzie R., 580 N.W.2d 660 (Wis. 1998).

assumed the juvenile justice system mandated only rehabilitation and treatment for its young offenders, today's juvenile court imposes criminal-like responsibility and accountability on children, as it "punishes" them for their "crimes." Since McKeiver, Pennsylvania and many other states have amended their juvenile codes to incorporate features historically associated with the adult criminal system. These sweeping changes, described below, render McKeiver's underlying premise untenable today.[5]

A. RECENT AMENDMENTS TO THE PENNSYLVANIA JUVENILE ACT HAVE DISCARDED THE PROTECTIVE FEATURES OF THE HISTORIC JUVENILE COURT

In 1995, Pennsylvania's General Assembly adopted a series of amendments to the state's Juvenile Act, 42 Pa. Cons. Stat. § 6301 et seq. (amended 1995) ("the Act"), which significantly altered the operation and purpose of Pennsylvania's juvenile courts. As reflected in the Act's new purpose clause and several other new provisions, the General Assembly made plain its intention to criminalize, rather than decriminalize, delinquent behavior. These amendments included the following:

- **Amending the Act's purpose clause to require that balanced attention be given to, inter alia, the protection of the community and the imposition of accountability for offenses committed.** 42 Pa. Cons. Stat. § 6301 (b)(2) (amended 1995). With this new purpose clause, the General Assembly de-emphasized the juvenile court's historic focus on the treatment and

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Overwhelmingly, juvenile justice experts suggest that a finding of delinquency today is not substantially different – as measured by the degree of stigma and punishment it confers – from a finding of guilt in a criminal court. See, e.g., Thomas Grisso, The Competence of Adolescents as Trial Defendants, 3 Psychol. Pub. Pol'y & L. 3,4 (1997); see generally, Linda E. Frost & Robert E. Shepherd, Jr., Mental Health Issues in Juvenile Delinquency Proceedings, 11-FALL Crim. Just. 52, 59 (1996).

rehabilitation needs of the child and elevated the importance of public safety, punishment, and individual accountability.

- **Deleting from the prior Juvenile Act the goal "to remove from children committing delinquent acts the consequences of criminal behavior," thereby discarding the intention to shield juveniles from the stigma of a criminal conviction and its related consequences.** 42 Pa. Cons. Stat. § 6301 (b) (amended 1995).
- **Authorizing the automatic prosecution of juveniles as adults in the criminal justice system following only one prior delinquency adjudication of certain designated felonies.** 42 Pa. Cons. Stat. § 6302 (amended 1995). This provision subjects juveniles as young as fifteen to pretrial detention in adult jails and, if convicted, incarceration in adult prisons, if they are adjudicated delinquent for one of eight designated felonies, and then rearrested and charged with one of those felonies.
- **Opening juvenile proceedings to the public.** 42 Pa. Cons. Stat. § 6336 (e)(1)(2) (amended 1995). Pennsylvania's new Juvenile Act expressly opens juvenile proceedings to the general public under a broad array of circumstances, including certain hearings involving children as young as 12 years of age.
- **Requiring the disclosure of juvenile delinquency adjudications, dispositions and related information to schools.** The new Act requires disclosure of delinquency adjudications to the principal of any public, private, or parochial school in which the juvenile is enrolled as well as to his teachers. 42 Pa. Cons. Stat. § 6341 (b.1)(1) (amended 1995). Further, the juvenile court and the probation department may disclose any information "to the school deemed necessary to protect public safety" or aid in the treatment or

rehabilitation of the child. § 6341 (b.1)(3) (amended 1995).

- **Opening juvenile records to the public, thereby erasing the historic promise of confidentiality.** In addition to the required disclosure to the juvenile's school, a juvenile's delinquency records are now open to the court and its staff in any proceeding, to other law enforcement officers, 42 Pa. Cons. Stat. §§ 6307 (4) - (5), 6308 (a) (amended 1995), and to members of the public under specified circumstances. § 6308 (b) (amended 1995).
- **Allowing the fact of the juvenile's adjudication of delinquency to be used against him in any subsequent juvenile proceeding to the same extent that a prior criminal conviction could be used against any criminal defendant.** 42 Pa. Cons. Stat. § 6354 (4) (amended 1995). Having dropped the original goal of the juvenile court to spare the juvenile offender the consequences of criminal behavior, a juvenile's delinquency adjudication may now be used against him in adult criminal proceedings for the purposes of impeachment, determining bail, pre-sentence investigations, and sentence enhancement, precisely as an adult offender's records would be used.

These amendments, all of which apply to Petitioner J.F., reflect the state's rejection of its longstanding commitment to decriminalize delinquent behavior in favor of a system that imposes far-reaching, criminal consequences lasting well beyond the juvenile's minority.

B. THE TRANSFORMATION OF PENNSYLVANIA'S JUVENILE COURT HAS BEEN MIRRORED THROUGHOUT THE COUNTRY

The above-described revisions to Pennsylvania's Juvenile Act, far from an isolated event, are part of a national trend to criminalize the juvenile court. The following data show how deep and widespread this national "reform" movement has become:

- **As of 1997, seventeen states had changed the purpose clauses of their juvenile codes to incorporate goals of punishment, accountability, and public safety, traditional objectives of the criminal justice system.** Patricia Torbet & Linda Szymanski, Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, State Legislative Responses to Violent Juvenile Crime: 1996-97 Update, p. 9 (1998).
- **As of 1997, thirty states required or permitted opening delinquency hearings to the public, including, in some instances, the media,** id. at 8, up from only twenty-two states in 1995. Patricia Torbet, et al., Office of Juvenile Justice and Delinquency Prevention, U.S. Dep't of Justice, State Responses to Serious and Violent Juvenile Crime, p. 36 (1996).
- **At the end of the 1997 legislative session, forty-two states permitted the media and the general public access to a juvenile offender's name, address, and picture.** Torbet & Szymanski, supra, at 8. Mississippi actually requires publication of the names of repeat juvenile offenders and their parents. Bureau of Justice Statistics, U.S. Dep't of Justice, Privacy and Juvenile Justice Records: A Mid-Decade Status Report, p. 20 (1997). Idaho makes all juvenile records open to public inspection unless there is a

court order forbidding it. Id.

- **Forty-eight states now open juvenile court records to the public, victims, schools, prosecutors, law enforcement, and social agencies under a "need to know" standard.** Torbet & Szymanski, supra, at 12. Juvenile records may also be disclosed to employmen and licensing agencies (e.g., law enforcement, the military, day care centers, and schools) for hiring and security purposes. Bureau of Justice Statistics, supra, at vii.
- **Criminal courts in nearly all the states consider the juvenile's record for sentencing purposes.** Neal Miller, National Institute of Justice, U.S. Dep't of Justice, State Laws on Prosecutors' and Judges' Use of Juvenile Records, p. 2 (1995).
- **As of 1997, twenty-five states had either toughened the criteria for expungement of juvenile records or prohibited the expungement/sealing of juvenile records entirely.** Torbet & Szymanski, supra, at 14.
- **Forty-seven states allow juveniles who have been arrested to be fingerprinted.** Torbet & Szymanski, supra, at 13.
- **Forty-six states allow juveniles who have been arrested to be photographed.** Torbet & Szymanski, supra, at 13.
- **At the end of the 1997 legislative session, forty-four states required a juvenile's fingerprints and other identifying information to become part of either the adult criminal repository or a separate juvenile repository.** Torbet & Szymanski, supra, at 13. For example, Texas and Utah maintain a statewide juvenile justice information system, while Iowa allows records of adjudicated juveniles to be held in the State central criminal history repository. Bureau of Justice Statistics, supra, at 24-25.

- **Thirty-nine states require adjudicated juveniles to register for specific sex offenses.** Torbet & Szymanski, supra, at 13. In some states, blood and saliva are collected for DNA purposes from juveniles arrested or adjudicated for sex offenses or murder. Id.

C. THIS COURT'S DECISIONS IN ALLEN v. ILLINOIS AND KANSAS v. HENDRICKS CONFIRM THAT THE MODERN JUVENILE COURT HAS BEEN RE-CAST INTO A MORE CRIMINAL-LIKE PROCEEDING.

In Allen v. Illinois, 478 U.S. 364 (1986), and Kansas v. Hendricks, 521 U.S. 346, 138 L.Ed.2d 501 (1997), two post-McKeiver decisions, this Court addressed the distinction between punishment and treatment and "civil" and "criminal" in determining the applicability of traditional criminal safeguards to proceedings involving involuntary confinement. Hendricks and Allen support J.F.'s argument that the changes to the juvenile court since McKeiver have pushed the court so far toward the punishment model of retributive justice that extension of the right to jury trial is now constitutionally compelled.

In Kansas v. Hendricks, this Court considered whether Kansas' civil commitment statute for sexually violent predators violated either the Constitution's double jeopardy clause or its ban on ex poste facto lawmaking. In a decision written by Justice Thomas, this Court held that neither constitutional provision was violated, stating it was "unpersuaded by Hendrick's argument that Kansas has established criminal proceedings." Hendricks, 521 U.S. at ___, 138 L.Ed.2d at 514. Specifically, this Court found that the statute did not serve "the two primary objectives of criminal punishment: retribution or deterrence." 521 U.S. at ___, 138 L.Ed.2d at 515. Applying the rationale of Justice Thomas in Hendricks to today's remodeled juvenile justice system demonstrates that the present juvenile court, unlike the Kansas commitment scheme, meets these threshold requirements for a criminal proceeding.

According to Justice Thomas, a statute will be deemed to

have a retributive purpose where it "affix[es] culpability for prior criminal conduct." Hendricks, 521 U.S. at ___, 138 L.Ed.2d at 515. This purpose was found lacking in the Kansas statute where evidence of prior misconduct was used only to establish either a "mental abnormality" or to demonstrate future dangerousness. Id. In fact, Kansas did not even require a prior criminal conviction as a prerequisite for commitment under the statute. In contrast, the new purpose clause of the Pennsylvania Juvenile Act as amended expressly provides that, for children committing delinquent acts, the court provide balanced attention to, inter alia, "the protection of the community [and] the imposition of accountability for offenses committed" 42 Pa. Cons. Stat. § 6301 (b)(2) (amended 1995) (emphasis added). Similarly, the Act also specifically requires that dispositions for delinquent children provide this same balanced attention to, inter alia, "the protection of the community [and] the imposition of accountability for offenses committed." 42 Pa. Cons. Stat. § 6352 (amended 1995) (emphasis added). Under no circumstances can a child be committed to a delinquent facility under the Act in the absence of a finding that the child committed a criminal act. 42 Pa. Cons. § 6302 (amended 1995). As discussed infra, similar provisions "affixing culpability," i.e., imposing accountability, for offenses committed by juveniles have been adopted in many other states around the country.

With respect to Hendricks' holding that the Kansas statute had no deterrent effect, this Court emphasized two features of the Kansas commitment scheme. First, since persons committed under the statute must suffer from a "mental abnormality" or "personality disorder" that prevents them from exercising adequate control over their behavior, the Court found such persons "unlikely to be deterred by the threat of confinement." Hendricks, 521 U.S. at ___, 138 L.Ed.2d at 515. Second, the Court saw no evidence of a punitive intent behind such confinement, where Kansas had represented that the conditions of confinement were essentially the same as those experienced by involuntarily committed persons in the state mental hospitals. Hendricks, 521 U.S. at ___, 138 L.Ed.2d at 516.

Applying this test to Pennsylvania's current Juvenile Act again shows the Act more readily fits the criminal, rather than rehabilitative, model. Unlike the Kansas statute, the threshold

requirement for "commitment" under the Juvenile Act is the commission of a criminal act. And while a delinquent child under the Act must also be "in need of treatment, supervision, or rehabilitation," 42 Pa. Cons. Stat. § 6302 (amended 1995) (emphasis added), such a finding is presumed in the case of a child found to have committed acts that would constitute a felony, id. § 6341 (b). Moreover, a finding of a need for supervision only, for example, but not treatment, is plainly sufficient to trigger confinement. Finally, there is no provision in the Act requiring that the conditions of confinement for delinquent children mirror the conditions of confinement for mentally ill children. In fact, mentally ill children requiring commitment cannot be committed under the Juvenile Act, but must be committed pursuant to Pennsylvania's Mental Health Procedures Act. Id. § 6356.

In addition to finding no evidence of a retributive or deterrent purpose in the Kansas statute, this Court also noted the absence of a scienter requirement to commit an individual found to be a sexually violent predator. As Justice Thomas observed, "[t]he existence of a scienter requirement is customarily an important element in distinguishing criminal from civil statutes." Hendricks, 521 U.S. at ___, 138 L.Ed.2d at 515 (citing Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963)). On this point as well, the current Pennsylvania juvenile court meets the test for distinguishing criminal from civil proceedings. As described above, the threshold requirement for confinement or any other disposition of a delinquent child under the Act is a finding, on proof beyond a reasonable doubt, that the child committed a criminal act. This includes a requirement that the Commonwealth meet its burden with respect to all of the elements of the crime, including any applicable scienter requirement. In the Interest of G.T., 409 Pa. Super. 15, 20, 597 A.2d 638, 640 (1991) (stating "the Commonwealth is not relieved of its burden of proof [of mens rea] merely by virtue of proceeding in juvenile court.")

Allen v. Illinois likewise supports J.F.'s argument. In Allen, this Court held that commitment proceedings under Illinois' Sexually Dangerous Persons Act were essentially "civil" in nature, and noted specifically that the statute "disavowed any interest in punishment, provided for the treatment of those it commits, and established a system under which committed

persons may be released after the briefest time in confinement." Allen, 478 U.S. at 370. Concluding that the Act "thus does not appear to promote either of 'the traditional aims of punishment – retribution and deterrence,'" id. (quoting Kennedy v. Mendoza-Martinez, 372 U.S. at 168), the Court held that the Illinois proceedings were not subject to the requirements of the Constitution's guarantee against compulsory self-incrimination.

Significantly, this Court rejected Allen's argument that the extension of the privilege against self-incrimination to juveniles in Gault supported his Fifth Amendment claim with respect to the Illinois scheme. This Court specifically distinguished the State's intent in Gault "to punish its juvenile offenders, observing that in many States juveniles may be placed in 'adult penal institutions' for conduct that if committed by an adult would be a crime." Allen, 478 U.S. at 373 (quoting Gault, 387 U.S. at 49-50 (emphasis added)). In drawing such a sharp distinction between the civil commitment scheme in Allen and the McKeiver-era juvenile court in terms of its criminal orientation, this Court acknowledged the juvenile's right to greater constitutional protections. That need is even greater today, where the juvenile court has become an even more punishment-driven system than it was when Gault and McKeiver were decided.

Additionally, this Court's rejection of Allen's claim based on its further observation that the Illinois statute provided for immediate release once the individual shows he is no longer dangerous and therefore no longer in need of treatment, Allen, 478 U.S. at 369, also distinguishes the Illinois commitment proceeding from contemporary juvenile court sentencing practices. Under the Pennsylvania Juvenile Act, while no juvenile can be held in a juvenile facility past his twenty-first birthday, the juvenile may continue to be held in confinement until that time if his commitment continues to serve the Act's purpose of providing balanced attention to, inter alia, "the protection of the community and the imposition of accountability for offenses committed." 42 Pa. Cons. Stat. §§ 6352, 6353. In contrast to the Illinois commitment procedure, in Pennsylvania a juvenile's "sentence" is linked to the nature of his offense and the continuing need to protect the community through incapacitation and deterrence. The Juvenile Act simply doesn't authorize release based on the

juvenile's showing that he no longer needs treatment. Importantly, as one prominent commentator has observed, this criminalization of juvenile court sentencing practices reflects a national trend:

> Since McKeiver, . . . nationally . . . juvenile justice theory and practice have shifted from therapeutic individualized dispositions toward an emphasis on public safety, the seriousness of the youth's offense, and social control. Consequently, there is very little to distinguish sentencing policies for youths charged with crimes from those for adults.

Barry C. Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform, 79 Minn. L. Rev. 965, 1106 (1995).

D. McKEIVER'S PREMISE THAT JUDGES COULD BE AS FAIR AS JURORS IN ASSESSING GUILT OR INNOCENCE IN THE JUVENILE COURT IS OF QUESTIONABLE ACCURACY TODAY

Justice Blackmun's reluctance to impose the jury trial on the juvenile court was further premised on his belief that the jury "would not strengthen greatly, if at all, the factfinding function" of the juvenile court. McKeiver, 403 U.S. at 547. Although the plurality acknowledged the potential for pre-judgment in the juvenile court due to such factors as relaxed evidentiary standards and repeated appearances by the juvenile before the same judge, this risk was summarily dismissed as "choos[ing] to ignore . . . every aspect of fairness, of concern, of sympathy, and of paternal attention that the juvenile court system contemplates." McKeiver, 403 U.S. at 550.

The plurality did not elaborate on the basis for its belief in the inherent fairness of the judicial factfinder. Admittedly, weighing the comparative accuracy or fairness of judges and juries is probably not susceptible to precise analysis. However, in a recent article by two prominent juvenile court commentators examining dozens of appellate decisions which reviewed juvenile court judges' determinations of delinquency, the authors suggest

ample reason to question this essential premise. See generally, Martin Guggenheim & Randy Hertz, Reflections On Judges, Juries and Justice: Ensuring the Fairness of Juvenile Delinquency Trials, 33 Wake Forest L. Rev. 553 (Fall 1998). As Guggenheim and Hertz found, "judges often convict on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt." Id. at 563.[6] Importantly, the authors based their conclusion not only on cases of evident bias either against the juvenile or in favor of law enforcement, but also on cases where "even fair-minded judges . . . convict[ed] alleged delinquents on obviously insufficient evidence." Id. at 570. The authors concluded that the problem of flawed fact-finding in the current juvenile justice system is systemic rather than isolated, resting on particular features of the juvenile court that "[skew] the judgment of fair-minded jurists." Id.

In reaching this conclusion, Guggenheim and Hertz highlighted two specific features of the court that impede fair and accurate judicial decision making. These features include:

• Case Related Factors – juvenile court judges are often exposed to inadmissible, extra-record evidence which often points indisputably to the juvenile's guilt. Although appellate courts generally assume that a trial judge disregards inadmissible evidence when deciding the case at trial, Guggenheim and Hertz point to empirical evidence (and judges' own acknowledgments) that such highly prejudicial information often taints judicial decision making. Id. at 571. "[I]t strains the imagination to believe that a judge would not be affected by knowledge of a confession, if only at an unconscious level." Id. at 573.

• Individual vs. group dynamics in decision making – social scientific studies show that groups perform better than individuals because the prejudices of individual members of the group are frequently counterbalanced by the more diverse

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Although not directly relevant to the issue herein, Guggenheim and Hertz examined judicial factfinding at other stages of the juvenile court process, such as pre-trial motions to suppress, and found similar cause to question the accuracy and fairness of judicial decision making. Id. at 568.

perspectives of all the members of that group that are brought to bear on the evaluation of conduct and motivation. Id. at 575-576. As this Court has previously recognized, a key virtue of the jury model is that it brings people "from different walks of life . . . into the jury box," thus ensuring that "a variety of different experiences, feelings, intuitions and habits" assess the facts and witnesses. United States ex rel. Toth v. Quarles, 350 U.S. 11, 18 (1955). Indeed, "twelve people's experiences and perspectives, rather than a single judge's . . . [increase] the likelihood that witnesses' credibility will be assessed accurately and facts correctly found." Guggenheim & Hertz, supra, at 576. This inherent potential for greater accuracy in group decision making serves the central purpose of the Sixth Amendment's jury trial guarantee, "to create . . . an inestimable safeguard against . . . the compliant, biased or eccentric judge." Duncan v. Louisiana, 391 U.S. at 156.

Additionally, Guggenheim and Hertz determined that judges are more likely than jurors to overlook salient facts, both because members of a group may remember facts forgotten by other members of the group, and because a judge's attention is constantly diverted by the need to resolve pending evidentiary issues and manage the ongoing work of the courtroom. Guggenheim & Hertz, supra, at 578; see also, Ballew v. Georgia, 435 U.S. 223, 233 (1978).

Finally, Guggenheim and Hertz point to social scientific studies showing "that the give and take of a discussion format promotes accuracy and good judgment by ensuring that competing viewpoints are aired and vetted." Guggenheim & Hertz, supra, at 578-579. These studies of juries and other groups demonstrate that group members commonly abandon even the strongest of prejudgments as they are confronted with viewpoints which they did not initially recognize or value. Id. at 579.

Guggenheim's and Hertz' conclusion that this Court erred in McKeiver by assuming that the jury would not sufficiently enhance fact-finding in the juvenile court is more than demonstrated by the decision below. Petitioner J.F. was adjudicated delinquent by the trial judge of a serious sexual offense -- involuntary deviate sexual intercourse -- based on the testimony of the victim in which she recounted the incident as a

dream, she could not identify J.F. as the perpetrator, and where there was no medical or other physical evidence that the victim had in fact been sexually assaulted. J.F.'s case is yet another example of an adjudication based "on evidence so scant that only the most closed-minded or misguided juror could think the evidence satisfied the standard of proof beyond a reasonable doubt." Id. at 570.

E. McKEIVER CAN NO LONGER BE SQUARED WITH THIS COURT'S HOLDING IN DUNCAN v. LOUISIANA

Whether or not the transformation of the modern juvenile court has eliminated all distinctions between juvenile and criminal defendants for Sixth Amendment purposes, the "fundamental fairness" analysis of both Duncan and Gault require the extension of the jury trial to J.F. under the circumstances herein.

In Duncan v. Louisiana, this Court extended the Constitutional right to trial by jury to criminal defendants subject to state prosecutions, declaring that fundamental fairness in adult criminal proceedings requires both factual accuracy and a buffer against government oppression. The Court stated:

> A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . . Providing an accused with the right to be tried by a jury gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased or eccentric judge . . . Fear of unchecked power . . . found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan, 391 U.S. at 155-56. The Court held that the right to jury trial is "a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." Id. at 158.

In accordance with Duncan, the Constitutional right to

jury trial is only guaranteed to defendants charged with a serious crime or offense. Id. at 159-160. In defining the precise contours of the right to jury trial for criminal defendants, this Court has held that an offense carrying a maximum prison term of more than six months is deemed "serious" such that the right to a jury trial attaches. Lewis v. United States, 518 U.S. 322, 326 (1996). "Crimes punishable by sentences of more than six months are deemed by the community's social and ethical judgements to be serious . . . Opprobrium attaches to conviction of those crimes regardless of the length of the actual sentence imposed, and the stigma itself is enough to entitle the defendant to a jury." Id. at 334 (J. Kennedy concurring)

Given this Court's threshold requirement of a maximum sentence of six months or more for extending the right to jury trial to criminal defendants, the continuing denial of this right to juveniles is unjustified. Under Pennsylvania's Juvenile Act, juveniles may be committed to an institution for a period equal to the sentence an adult would receive for the same offense, provided the initial period of commitment does not exceed four years. The initial period of commitment may then be extended, subject to the termination of juvenile court jurisdiction when the juvenile reaches age twenty-one. 42 Pa. Cons. Stat. § 6353 (amended 1995). These "objective indications of the seriousness with which society regards the offense," Frank v. United States, 395 U.S. 147, 148 (1969), upon which this Court has relied in the past to determine the applicability of right to jury trial, mandate extension of the right here. In accordance with Pennsylvania law, an adult convicted of involuntary deviate sexual intercourse may be sentenced to a maximum of sixteen years. 18 Pa. Cons. Stat. § 3123. Accordingly, since Petitioner was fifteen at the time he was committed, the maximum period of confinement to which he could be subjected far exceeded six months. Under these circumstances, "[t]here is no principled justification for denying to young people the same procedural protections that other citizens receive as a matter of constitutional right." Feld, supra, at 1106 n.636.

III. THE DOCTRINE OF *STARE DECISIS* DOES NOT PREVENT THIS COURT FROM OVERTURNING McKEIVER WHERE THE FACTUAL AND LEGAL UNDERPINNINGS OF THAT DECISION ARE NO LONGER VALID

In a series of decisions, this Court has established that the principle of *stare decisis* is no bar to the reversal of prior decisions when such "decisions are unworkable or badly reasoned." Payne v. Tennessee, 501 U.S. 808, 827 (1991). In such cases, "this Court has never felt constrained to follow precedent." Id. (citing Smith v. Allwright, 321 U.S. 649, 665 (1944)). In particular, where the challenged decision involves an interpretation of the Constitution, this Court has consistently held that "[*stare decisis*] is at its weakest when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions." Agostini v. Felton, 521 U.S. 203, ___, 138 L.Ed.2d. 391, 422 (1997). See also, Payne, 501 U.S. at 828 ("*[S]tare decisis* is not an inexorable command . . . This is particularly true in constitutional cases, because in such cases correction through legislative action is practically impossible."); Seminole Tribe of Florida v. Florida, 517 U.S. 44, 66 (1996) (concluding that *stare decisis* is not a bar to overturning an earlier decision where "[t]he case involved the interpretation of the constitution and therefore may be altered only by constitutional amendment or revision by this Court."); St. Joseph Stockyards Co. v. United States, 298 U.S. 38, 94 (1936) (Stone and Cardozo, JJ., concurring in result) ("The doctrine of *stare decisis* . . . has only a limited application in the field of constitutional law.")[7]

Moreover, while noting that "*[s]tare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles," Payne, 501 U.S. at 827, this Court also has repeatedly acknowledged that the doctrine is "not an inexorable command; rather, it is a principle of

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In Payne, this Court noted that in the last twenty terms it had overruled, in whole or in part, thirty-three earlier constitutional decisions. Payne, 501 U.S. at 828.

policy and not a mechanical formula of adherence to the latest decision." Id. at 828 (quoting Helvering v. Hallock, 309 U.S. 106, 119 (1940) (internal quotes omitted)). The policy of *stare decisis* must be weighed against the "competing interest . . . in recognizing and adapting to changed circumstances and the lessons of accumulated experience." State Oil Company v. Khan, 522 U.S. 3,___, 139 L.Ed.2d 199, 213 (1997).

In accordance with these considerations, McKeiver is ripe for re-examination, given its limited interpretation of the applicability of the Fourteenth Amendment to juvenile court proceedings, and the serious doubts that have been raised about the current validity of the Blackmun-White rationale in the face of sweeping changes to the juvenile court since McKeiver was decided. First and foremost, as a constitutional decision, the applicability of *stare decisis* is significantly diminished because only this Court can change its earlier decision. Lower courts are bound to follow the teaching of McKeiver, regardless of the lack of continuing wisdom of that decision. This has been borne out, as nearly every court asked to re-examine this issue since 1971 has felt constrained to follow McKeiver, despite the absence of a majority rationale.[8]

Moreover, the failure of the plurality to garner majority support for the Blackmun -White rationale in itself supports re-examination of the ruling, as it further strains its precedential value. This Court has relied on the fact that a case was "decided by the narrowest of margins" to support reversals in other contexts. Payne, 501 U.S. at 828-829; Nichols v. U.S., 511 U.S. 738, 746, (1994) ("[The] degree of confusion following a splintered decision . . . is itself a reason for reexamining that decision.") Additionally, *stare decisis* may be discarded where a previous decision has been "the subject of continuing controversy and confusion under the great weight of scholarly criticism." Khan, 522 U.S. at ___, 139 L.Ed.2d at 213 (quoting Continental T.V. Inc. v. GTE Sylvania, 433 U.S. 36, 47-48 (internal quotes omitted)). Likewise here, in the nearly three decades since McKeiver was decided, a burgeoning body of scholarly criticism

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[8] See note 4 supra.

has emerged, urging reversal of McKeiver.[9] Yet unless and until this Court acts, courts and scholars are powerless to reset the constitutional balance in juvenile courts themselves.

Finally, where McKeiver's "infirmities, [and] its increasingly wobbly, moth-eaten foundation," State Oil Co. v. Khan, 522 U.S. at ___, 139 L.Ed.2d at 212 (1997) (quoting State Oil Co. v. Khan, 93 F.3d 1358, 1363 (7th Cir. 1996) (vacated and remanded by same), have been so thoroughly exposed in the intervening years, "there is not much of [McKeiver] to salvage." Khan, 522 U.S. at ___, 139 L.Ed.2d at 213. Pennsylvania is simply one of dozens of states that have amended their juvenile codes to impose criminal-like accountability on juvenile offenders and to provide sanctions that are now designed to impose punishment as much as foster rehabilitation. As such, "changed circumstances and the lessons of accumulated experience," id., in the area of juvenile justice counsel that this Court reevaluate McKeiver to determine if it remains a "[]workable" and "[well]-reasoned" decision. Payne, 501 U.S. at 827.

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See, e.g. Mark I. Soler et al., Representing the Child Client 5.03 [11][h] (1987 & Supp. 1998); Susan E. Brooks, Juvenile Injustice: The Ban on Jury Trials for Juveniles in the District of Columbia, 33 U. Louisville J. Fam. L. 875 (1995); Barry C. Feld, Violent Youth and Public Policy: A Case Study of Juvenile Justice Law Reform, 79 Minn. L. Rev. 965 (1995); Barbara F. Katz, Juveniles Committed to Penal Institutions – Do They Have a Right to Jury Trial? 13 J. Fam. L. 675 (1974); Orman W. Ketcham, McKeiver v. Pennsylvania: The Last Word on Juvenile Court Adjudications?, 57 Cornell L. Rev. 561 (1972); Edward J. McLaughlin & Lucia B. Whisenand, Jury Trial, Public Trial and Free Press in Juvenile Proceedings: An Analysis and Comparison of the IJA/ABA, Task Force, and NAC Standards, 46 Brook. L. Rev. 1 (1979); Joseph B. Sanborn Jr., The Right to a Public Jury Trial: A Need for Today's Juvenile Court, 76 Judicature 230 (1993); W.J. Keegan, Comment, Jury Trials for Juveniles: Rhetoric and Reality, 8 Pac. L.J. 811 (1977); Korine L. Larsen, Comment, With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts, 20 Wm. Mitchell L. Rev. 835 (1994); Note, A Recommendation for Juvenile Jury Trials in Minnesota, 10 Wm. Mitchell L. Rev. 587 (1984); David C. Owen, Comment, Striking Out Juveniles: A Reexamination of the Right to a Jury Trial in Light of California's "Three Strikes" Legislation, 29 U.C. Davis L. Rev. 437 (1996).

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully Submitted,

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IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN THE INTEREST OF: J.F.(A MINOR)

No. 537 M.D. Alloc. Dkt. 1998

Petition of J.F.: Petition for Allowance of Appeal from Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 17th day of December 1998, the Petition for Allowance of Appeal is denied.

/s/ S. BAILEY
SHIRLEY BAILEY
CHIEF CLERK

IN THE INTEREST OF: J.F.
APPEAL OF: J.F.

IN THE INTEREST OF: G.G.
APPEAL OF: G.G.

Nos. 494 Harrisburg 1997, 628 Harrisburg 1997

SUPERIOR COURT OF PENNSYLVANIA

714 A.2d 467; 1998 Pa. Super. LEXIS 1017

June 2, 1998, Filed

PRIOR HISTORY: Appeal from the ORDER ENTERED April 1, 1997. In the Court of Common Pleas of Dauphin County JUVENILE No. 88 JD 1997.

Appeal from the ORDER ENTERED July 7, 1997. In the Court of Common Pleas of DAUPHIN County JUVENILE No. 534 JD 1996.

Before TURGEON, J.

DISPOSITION: The order entered at 494 HBG 1997 is affirmed. The order entered at 628 HBG 1997 is reversed and defendant is discharged.

COUNSEL: Marsha Levick, Philadelphia, for appellants.
Eric R. Augustine, Deputy District Attorney, Harrisburg, for Commonwealth, appellee.

JUDGES: BEFORE: CAVANAUGH, POPOVICH and FORD ELLIOTT, JJ.

OPINION BY: CAVANAUGH

OPINION:
[*469] OPINION BY CAVANAUGH, J.:

These consolidated appeals require that we once again examine the constitutional implications of certain 1995 amendments to the Juvenile Act. Specifically, we must determine whether due process requires that appellants, each of whom was charged with certain designated felonies under the Juvenile Act, be afforded a right to a jury trial given that: (1) the recent amendments to the Act allegedly serve to substantially criminalize the juvenile court; and (2) appellants' respective adjudications will lead to their being charged as adults for any subsequent arrest for one [**2] of these designated felonies. J.F. and G.G. also challenge the sufficiency of the evidence to sustain their respective adjudications of delinquency. After careful review, we discern no constitutional violation and find the evidence sufficient to sustain the trial court's adjudication as to J.F. With respect to G.G. we find the evidence insufficient to sustain the court's adjudication. Accordingly, we affirm the order entered at 494 HBG 1997 and reverse the order entered at 628 HBG 1997.

J.F. and G.G. were charged in separate unrelated incidents. J.F. was charged with involuntary deviate sexual intercourse, rape and aggravated indecent assault in relation to an incident in which he allegedly sexually assaulted a fifteen year old girl while she was asleep in her bed. The court found beyond a reasonable doubt that J.F. committed the delinquent act of IDSI. It dismissed the remaining charges.

With respect to G.G., the Commonwealth charged him with robbery and criminal conspiracy in relation to an incident in which G.G.'s alleged co-conspirator verbally threatened and then took an item of personal property from another minor. The court found beyond a reasonable doubt that G.G. committed [**3] the delinquent act of criminal conspiracy. It dismissed the robbery charge. Following J.F.'s and G.G.'s respective appeals, we consolidated the cases for argument and disposition as they raised a common question of law.

Appellants' primary argument on appeal is that the amendments to the Juvenile Act have radically transformed the nature and function of Pennsylvania's juvenile court from a benevolent institution concerned with the welfare and rehabilitation of young offenders into a more punitive system, much more akin to the adult criminal justice system. They highlight that juveniles are now subject to numerous serious and far-reaching consequences as a result of an adjudication of delinquency, including: automatic prosecution of juveniles as adults in the criminal justice system following only one prior delinquency adjudication with respect to certain designated felonies; opening juvenile proceedings to the public for most purposes; requiring disclosure of delinquency adjudications to the offender's school; authorizing disclosure of juvenile records to the public under certain circumstances; and authorizing the use of a juvenile's delinquency record in [*470] any subsequent criminal prosecution [**4] for evidentiary, bail and sentencing purposes.

Recently in *Commonwealth v. Cotto, 708 A.2d 806, 1998 Pa. Super. LEXIS 36 (Pa. Super. 1998)* a different panel of this Court examined the constitutionality of the amended transfer provisions of the Juvenile Act. Although presented with different issues, our starting point is the same. In Cotto, the panel stated:

> We begin with the recognition that there is no constitutional guarantee to special treatment for juvenile offenders. *Commonwealth v. Williams, 514 Pa. 62, 71, 522 A.2d 1058, 1063 (1987).* Any right to treatment as a juvenile is derived from statutory law and is defined by the legislature. The legislature may restrict or qualify this right, but in doing so, must observe constitutional due process and avoid a classification scheme that is arbitrary or discriminatory. See *Kent v. United States, 383 U.S. 541, 86 S. Ct. 1045, 16 L. Ed. 2d 84 (1966); Stokes v. Fair, 581 F.2d 287* (1<st> Cir. 1978); *Woodard v. Wainwright, 556 F.2d 781* (5<th> Cir. 1977); *United States v. Bland, 153 U.S. App. D.C. 254, 472 F.2d 1329 (D.C. Cir. 1972).*

Cotto, 708 A.2d 806, 1998 Pa. Super. LEXIS 36 at *4.

In juvenile proceedings, constitutional [**5] due process guarantees a juvenile almost the full panoply of constitutional protections afforded at an adult criminal trial. See *In re Winship, 397 U.S. 358, 90 S. Ct. 1068, 25 L. Ed. 2d 368 (1970)*(in juvenile adjudicatory proceeding, elements of crime must be proven beyond a reasonable doubt); *In re Gault, 387 U.S. 1, 87 S. Ct. 1428, 18 L. Ed. 2d 527 (1967)*(in juvenile adjudicatory proceeding, juvenile entitled to adequate notice of charges, to counsel, to invoke right against self-incrimination, and to right of cross-examination). However, neither our courts nor the Supreme Court has mandated that a juvenile offender be afforded the right to a jury trial in a juvenile proceeding.

In *McKeiver v. Pennsylvania, 403 U.S. 528, 91 S. Ct. 1976, 29 L. Ed. 2d 647 (1971)* a majority of the Court agreed that due process did not guarantee the right to a jury trial in the adjudicative phase of a state juvenile court delinquency proceeding. Writing for the plurality, Justice Blackmun stated:

We conclude that trial by jury in the juvenile court's adjudicative stage is not a constitutional requirement. We so conclude for a number of reasons:

1. The Court has refrained [**6] . . . from taking the easy way with a flat holding that all rights constitutionally assured for the adult accused are to be imposed upon the state juvenile proceeding.

"It is clear to us that the Supreme Court has properly attempted to strike a judicious balance by injecting procedural orderliness into the juvenile court system. It is seeking to reverse the trend [pointed out in *Kent, 383 U.S. at 556, 16 L. Ed. 2d at 94]* whereby 'the child receives the worst of both worlds . . . .'"

2. There is a possibility, at least, that the jury trial, if required as a matter of constitutional precept, will remake the juvenile proceeding into a fully adversary process and will put an

effective end to what has been the idealistic prospect of an intimate, informal protective proceeding.

* * *

4. The Court has specifically recognized by dictum that a jury is not a necessary part even of every criminal process that is fair and equitable. *Duncan v. Louisiana, 391 U.S. [145] at 149-50, n.14, and 158, 20 L. Ed. 2d [491] at 496, and 501.*

5. The imposition of the jury trial on the juvenile court system would not strengthen greatly, if at all, the factfinding function, and would, contrarily, [**7] provide an attrition of the juvenile court's assumed ability to function in a unique manner. It would not remedy the defects of the system. Meager as has been the hoped-for advance in the juvenile field, the alternative would be regressive, would lose what has been gained, and would tend once again to place the juvenile squarely in the routine of the criminal process.

* * *

12. If the jury trial were to be injected into the juvenile court system as a matter of right, it would bring with it into that system the traditional delay, the formality, [*471] and clamor of the adversary system, and, possibly, the public trial.

McKeiver at 545-50, 29 L. Ed. 2d at 661-63.

As appellants correctly point out, the juvenile justice system has undergone a transformation over the past two decades in which there has been a move away from the rehabilitation and protection of juvenile offenders toward more punishment and correctional oriented policies. Nonetheless, we cannot conclude that a juvenile adjudication has, in essence, become the equivalent of an adult criminal proceeding. The recent amendments to the Act are a reflection of the changing nature of juvenile crime, as society has witnessed [**8] a progression in the number of violent offenses committed by juveniles.

While the principles and policies underlying our juvenile justice system have evolved, particular importance is still placed upon rehabilitating and protecting society's youth. Prior to amendment, the Juvenile Act provided:

(b) Purposes. -- This chapter shall be interpreted and construed as to effectuate the following purposes:

(2) Consistent with the protection of the public interest, to remove from children committing delinquent acts the consequences of criminal behavior, and to substitute therefor a program of supervision, care and rehabilitation.

42 Pa.C.S.A. § 6301(b)(2) (effective June 27, 1978). Once a child was found to be delinquent, the juvenile court was authorized to make orders of disposition that were "best suited to his treatment, supervision, rehabilitation and welfare." 42 Pa.C.S.A. § 6352 (effective June 27, 1978).

§§ 6301 and 6352 were both substantially altered by the 1995 amendments. § 6301(b)(2) now provides:

> (b) Purposes. -- This chapter shall be interpreted and construed as to effectuate the following purposes:
> (2) Consistent with the protection [**9] of the public interest, to provide for children committing delinquent acts programs of supervision, care and rehabilitation which provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable children to become responsible and productive members of the community.

42 Pa.C.S.A. § 6301(b)(2) (amended 1995)(emphasis supplied). Consistent with this language, the juvenile court, in the case of a child found to be delinquent, is authorized to make:

> "orders of disposition determined to be consistent with the protection of the public interest and best suited to the child's treatment, supervision, rehabilitation and welfare, which disposition shall,

> as appropriate to the individual circumstances of the child's case, provide balanced attention to the protection of the community, the imposition of accountability for offenses committed and the development of competencies to enable the child to become a responsible member of the community."

42 Pa.C.S.A. § 6352 (amended 1995).

The changes in the stated purpose of the Act reflect a concern that juveniles be held accountable [**10] for their actions and that the community be protected from violent juvenile offenders. These are not the court's exclusive concerns, however, as they must be balanced with the goal of developing juvenile offenders into responsible and productive members of the community. Any program of supervision, care and rehabilitation chosen by the juvenile court must provide balanced attention to all three of these concerns. As such, concern for the juvenile remains a cornerstone of our system of juvenile justice.

It is also highly significant that the juvenile adjudication proceeding remains an intimate, informal and protective proceeding. The Juvenile Act provides:

> § 6336. Conduct of hearings
> (a) General rule. -- Hearings under this chapter shall be conducted by the court without a jury, in an informal but orderly manner, and separate from other proceedings not included in section 6303 (relating to scope of chapter).

42 Pa.C.S.A. § 6336(a).

Appellants warn of dire and far-reaching consequences to juvenile offenders [*472] that the amendments to the Act will bring about. We find however, that these changes do not undermine the informal and protective nature [**11] of the juvenile proceeding and do not militate in favor of a finding that due process requires the right to a jury trial at the adjudication

proceeding.

With respect to (1) the automatic prosecution of juveniles as adults following a prior delinquency adjudication of a designated felony and (2) the use of the juvenile's delinquency record in subsequent criminal prosecutions for evidentiary, bail and sentencing purposes, we note that either of these situations will only occur, if at all, after a juvenile allegedly commits a new offense(s). Neither will directly nor indirectly affect the present adjudication. Moreover, at any subsequent criminal proceeding the juvenile will be afforded the right to a jury trial and any charged offenses will have to be proved beyond a reasonable doubt. Finally, because there is no constitutional right to treatment as a juvenile, the legislature is well within its right to withdraw any privileges granted under the pre-amended statute. See Cotto; *Commonwealth v. Presley, 455 Pa. Super. 13, 686 A.2d 1321 (Pa. Super. 1996)* (it is within right of legislature to withdraw privileges granted under preamended statute and those adjudicated delinquent under old Act bear [**12] risk that legislature may revoke such privileges in a subsequent enactment).

As to the remaining consequences highlighted by appellants, (1) the opening of juvenile proceedings to the public for most purposes, (2) requiring disclosure of delinquency adjudications to the offender's school and (3) authorizing disclosure of juvenile records to the public under certain circumstances, we note these measures are not designed to punish a juvenile offender but are deemed by the legislature to be necessary for the protection of the public. Each is minimally intrusive to the rights of the juvenile and with the exception of the opening of most juvenile proceedings to the public, take place only after an adjudication has occurred. Finally, as with the other consequences highlighted by appellants, the legislature retains the right to revoke any privileges afforded under the previous Act. See Presley.

Finally, we note that the disposition of the juvenile following an adjudication of delinquency is limited by statute. Pursuant to § 6352 (a), the court may make any of the following

orders of disposition:

> (1) Any order authorized by section 6351 (relating to disposition of dependent [**13] child). n1
> (2) Placing the child on probation under supervision of the probation officer of the court or the court of another state as provided in section 6363 (relating to ordering foreign supervision), under conditions and limitations the court prescribes.
> (3) Committing the child to an institution, youth development center, camp, or other facility for delinquent children operated under the direction or supervision of the court or other public authority and approved by the Department of Public Welfare.
> (4) If the child is 12 years of age or older, committing the child to an institution operated by the Department of Public Welfare.
> (5) Ordering payment by the child of reasonable amounts of money as fines, costs or restitution as deemed appropriate as part of the plan of rehabilitation considering the nature of the acts committed and the earning capacity of the child. .
> (6) An order of the terms of probation may include an appropriate fine considering the nature of the act committed or restitution not in excess of actual damages caused by the child which shall be paid from the earnings of the child received through participation in a constructive program of service or [**14] education acceptable to the [*473] victim and the court whereby, during the course of such service, the child shall be paid not less than the minimum wage of this Commonwealth. . . .
>
> In selecting from the alternatives set forth in this section, the court shall follow the general principle that the disposition imposed should

> provide the means through which the provisions of this chapter are executed and enforced consistent with section 6301(b) (relating to purposes) and when confinement is necessary, the court shall impose the minimum amount of confinement that is consistent with the protection of the public and the rehabilitation needs of the child.

42 Pa.C.S.A. § 6352(a). As is evident from these dispositional alternatives, a juvenile who is adjudicated delinquent does not face the grave consequences of criminal conviction and incarceration.

> n1 Pursuant to this subsection, the court may permit the child to remain with his parent, guardian or other custodian subject to any conditions or limitations prescribed by the court. The court may also transfer temporary legal custody to another individual or any private organization or public entity authorized to receive and provide care for children. Such a transfer is also subject to any conditions and limitations prescribed by the court.

[**15]

In view of the stated purposes of the amended Act, that the adjudication proceeding remains an informal protective proceeding, that the amendments to the Act do not undermine the goal of supervision, care and rehabilitation of juvenile offenders and that the dispositional alternatives available to the court remain rehabilitative and are not punitive in nature, we conclude that due process does not require that a juvenile be afforded the right to a jury trial at a juvenile adjudication proceeding. Much of the reasoning of the plurality in McKeiver, despite the changes in society and the juvenile system in the intervening twenty-seven years, remains valid and compelling in reference to the juvenile court system of today. Notwithstanding increasing evidence of instability in our society and the resultant changes in our system of juvenile justice, "we must never forget that in creating a separate juvenile system, the [legislature] did not seek to 'punish an

offender but to salvage a boy [sic] who may be in danger of becoming one.'" In the *Interest of K.B., 432 Pa. Super. 586, 639 A.2d 798, 807 (Pa. Super. 1994)*(quoting *In re Holmes, 379 Pa. 599, 603, 109 A.2d 523, 525 (1954))*, [**16] overruled on other grounds, *547 Pa. 237, 690 A.2d 175 (1997)*. The present scheme of the Act effectively retains this worthwhile goal, despite a greater emphasis on the protection of the public and the accountability of juvenile offenders, especially in regard to violent crimes. As such, we reaffirm the principle that due process does not require that a juvenile be afforded the right to a jury trial in a juvenile adjudication proceeding.

We now turn to the sufficiency claims.

> In evaluating a challenge to the sufficiency of the evidence, we view the evidence in the light most favorable to the Commonwealth, which has won the verdict, and draw all reasonable inferences in its favor. We then determine whether the evidence is sufficient to permit a jury to determine that each and every element of the crimes charged has been established beyond a reasonable doubt. It is the function of the jury to pass upon the credibility of the witnesses and to determine the weight to be accorded the evidence produced. The jury is free to believe all, part or none of the evidence introduced at trial. The facts and circumstances established by the Commonwealth "need not be absolutely incompatible [**17] with the defendant's innocence, but the question of any doubt is for the jury unless the evidence 'be so weak and inconclusive that as a matter of law no probability of fact can be drawn from the combined circumstances.'"

Commonwealth v. Shoup, 423 Pa. Super. 12, 620 A.2d 15, 17 (1993). (citations omitted). Moreover, a combination of direct and circumstantial evidence or circumstantial evidence alone will sustain a guilty verdict so long as the evidence links the accused to

the crime beyond a reasonable doubt. *Commonwealth v. Hardcastle, 519 Pa. 236, 246, 546 A.2d 1101, 1105 (1988).*

Viewing the evidence in the light most favorable to the Commonwealth as verdict winner, we find that it was sufficient to prove J.F. guilty beyond a reasonable doubt of IDSI. A person is guilty of IDSI when he or she engages in deviate sexual intercourse with a complainant:

> (1) by forcible compulsion;
> (2) by threat of forcible compulsion that would prevent resistance by a person of reasonable resolution; or
> (3) who is unconscious or where the person knows that the complainant is [*474] unaware that the sexual intercourse is occurring.

18 Pa.C.S.A. § 3123 (a).

The [**18] evidence at trial and the reasonable inferences that may be drawn therefrom established that J.F. was staying with the victim's family. While the victim was asleep, he entered her room and got into her bed while she was asleep. J.F. rubbed and squeezed the victim's breasts. He then placed his penis in her anus. The victim fell off of her bed. She heard someone running down the stairs. As she lay on the floor, she noticed that her pants were pulled partially down and that her underwear was wet. She also had red marks on her chest. At trial, victim identified J.F. as her attacker. In view of this evidence, appellant's sufficiency claim fails.

Turning to G.G.'s sufficiency claim, after careful review, we find the evidence insufficient to prove him guilty beyond a reasonable doubt of criminal conspiracy to commit robbery.

The Crimes Code defines criminal conspiracy:

> (a) Definition of conspiracy. -- A person is guilty of conspiracy with another person or persons to

> commit a crime if with the intent of promoting or facilitating its commission he:
>
> (1) agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes [**19] such crime or an attempt or solicitation to commit such crime; or
>
> (2) agrees to aid such other person or persons in the planning or commission of such crime or of an attempt or solicitation to commit such crime.

18 Pa.C.S.A. § 903(a).

The evidence at G.G's adjudication proceeding established the following. As victim was walking home from school, G.G.'s co-conspirator called for him to come across the street. Victim complied and co-conspirator spoke several words that were inaudible to victim. As victim turned to walk away, co-conspirator then told victim he wanted to see what was in victim's pockets and bag. Victim emptied his pockets and opened his bag. Co-conspirator and G.G. both peered into the bag and co-conspirator took a geometric compass from victim. Co-conspirator and G.G. then left the scene. Throughout the entire incident, G.G. spoke not a single word and made no threatening physical movements. In finding G.G. guilty of criminal conspiracy, the court stated:

> The definition of conspiracy includes with the intent of promoting or facilitating its commission and you will recall that the agreement under conspiracy can be tacit or implied. The difficulty here [**20] is we have got two juveniles and obviously the intimidating effect of two large juveniles together against this victim certainly enhanced his fear and reasonable fear for injury under the robbery statute.
>
> I find that as a factual matter [G.G.] made no verbal or physical acts in furtherance of the conspiracy in that he didn't reach into the bag and he didn't make any remarks. The issue that I

am struggling with is his mere presence certainly facilitated and promoted this robbery . . . taking place. I am going to find on the conspiracy but not find on the robbery and if the parties want to submit briefs and take exception to that and petition for reconsideration, I will certainly take a look at it but it's just my belief that he has a very intimidating hulking body and piercing eyes and look and I am sure that his presence certainly promoted and facilitated the commission of this crime by his mere presence. So we are not finding on the robbery for [G.G.] but I do think that he was part of the conspiracy.

In view of the record before us, we are constrained to conclude that the evidence was insufficient to prove the crime of criminal conspiracy beyond a reasonable doubt. The trial [**21] court specifically found that G.G. made no verbal or physical acts in furtherance of the conspiracy, but nonetheless found him guilty. Mere association or presence at the scene of a crime is insufficient to establish a conspiracy. *Commonwealth v. Lawson, 437 Pa. Super. 521, 650 A.2d 876 (Pa.Super. 1994); Commonwealth v. Swerdlow, 431 Pa. Super. 453, 636 A.2d 1173 (Pa. Super. 1994).* The record is [*475] devoid of any evidence of an agreement between G.G. and his alleged co-conspirator. As such, his conviction of criminal conspiracy is reversed.

We have reviewed appellants' due process argument. After considering it in light of the amendments to the Act and the policies underlying our juvenile system, we conclude that due process does not require that a juvenile be accorded the right of a jury trial at a juvenile adjudication proceeding. We have also reviewed the respective sufficiency of the evidence claims. The evidence in J.F.'s case was sufficient to prove his guilt of IDSI beyond a reasonable doubt. In G.G.'s case, the evidence was insufficient to prove his guilt of criminal conspiracy beyond a reasonable doubt.

Accordingly, the order entered at 494 HBG 1997 is affirmed. The order entered at 628 HBG 1997 [**22] is reversed and defendant is discharged.

IN THE INTEREST OF: J.F., A MINOR

IN THE COURT OF COMMONPLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. 90 J.D. 1997

MOTION FOR JURY TRIAL

ORDER

AND NOW, this 25th day of April 1997, juvenile J.F.'s Motion for Jury Trial is hereby denied. The reasons for denial are set forth in an Opinion issued this day In the Interest of G.G., No. 534 J.D. 1996 (Dauph. C.P. April 25, 1997), which is attached as Exhibit A to this Order.

BY THE COURT:

/s/ J. Turgeon
JEANNINE TURGEON, JUDGE

Distribution:
Bradley A. Winnick, Esq. - Public Defender's Office
Kathryn Waters-Perez, Esq. - District Attorney's Office

IN THE INTEREST OF: G.G., A MINOR

IN THE COURT OF COMMONPLEAS
DAUPHIN COUNTY, PENNSYLVANIA

No. 534 J.D. 1996

CHARGES: ROBBERY; CRIMINAL CONSPIRACY TO COMMIT ROBBERY

OPINION

Presently before the Court is the juvenile's Motion for a Jury Trial. For the reasons set forth below, the Motion is denied.

Facts

In October of 1996, G.G., a minor, was arrested and a juvenile petition was filed alleging that he committed robbery and criminal conspiracy to commit robbery. At the detention hearing, probable cause was found on these charges, and the juvenile was released into his parent's custody. The juvenile's present motion seeks to have these delinquency charges decided by a jury, raising due process and equal protection arguments.

Legal Discussion

Although the Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, guarantees to all criminal defendants the right to an impartial jury, the United States Supreme Court declined to extend this right to juvenile proceedings. McKeiver v. Pennsylvania, 403 U.S. 528 (1971). The Supreme Court reasoned: "[t]he other procedural rights held applicable to the juvenile process 'will give the juveniles sufficient protection' and the addition of the trial by jury 'might well destroy the traditional character of the juvenile proceedings.'" Id. at 540 (quoting In the Matter of Terry, 438 Pa. 339, 349-50, 265 A.2d 350, 355 (1970)). Furthermore, the Court cautioned that a jury trial "will remake the juvenile proceeding into a fully adversary process" and will effectively end the ideology of the juvenile system of an "intimate, informal protective proceeding." Id. at 545. Consequently, and with the

recent amendments to the Juvenile Act, the Pennsylvania legislature has specifically determined that juvenile hearings shall be conducted "by the court without a jury." 42 Pa.C.S.A. § 6336(a) (Purdon Supp. 1996).

Due Process

In In the Interest of K.B., the Superior Court addressed the reoccurring problem of the courts acceding to the juvenile offenders' requests to apply certain adult rights and privileges to the juvenile adjudicatory hearing under the premise of Gault and its progeny. 432 Pa. Super. 586, 590, 639 A.2d 798, 800 (1994). The Superior Court noted:

> The juvenile's request for the judiciary's extension of adult rights to the juvenile proceedings. . . misses the point of the Juvenile Act. The Juvenile Act was not enacted to dole out punishments for the crimes of our wayward youths; to the contrary, it was enacted to determine the proper therapeutic course on which to launch the young offender. In extending adult rights to the juvenile offender, we vilify this profound and lofty goal.

432 Pa. Super. at 602, 639 A.2d at 806. Furthermore, the Superior Court explained that the Juvenile Act included procedures that met the due process requirements of Gault. 432 Pa. Super. at 599, 639 A.2d at 805 (right to counsel, right to cross-examine and confront adverse witnesses, freedom from self-incrimination, beyond a reasonable doubt burden of proof). Therefore, not only does the Juvenile Act balance the competing interests of the Commonwealth of rehabilitation and protection, and the juvenile's receiving due process,, but also the court noted how the Act avoids the harshness of the criminal process on a juvenile offender:

> [T]he juvenile is not "branded" with the stigma of a criminal conviction, but is simply "adjudged delinquent." The juvenile is not sentenced to lengthy terms in adult prisons, but is provided with forms of treatment and rehabilitation. Furthermore, throughout the entire judicial process, the juvenile faces not a court empowered with a limitless degree

> of discretion and authority to act as it sees fit, but accorded a process which respects both the juvenile's right to fair treatment and due process of laws.

432 Pa. Super. at 599-600, 639 A.2d at 805. To continue to grant the juvenile the rights given to the criminal offender under the premise that the due process standard of "fundamental fairness" requires such action, the court may effectively dissolve the Juvenile Act itself. 432 Pa. Super. at 602, 639 A.2d at 806. The court stated: "[W]e must never forget that in creating a separate juvenile system, the Commonwealth did not seek to 'punish an offender but to salvage a boy who may be in dander of becoming one.'" 432 Pa. Super at 603, 639 A.2d at 807 (quoting In re Holmes, 379 Pa. 599, 603, 109 A.2d 523, 525 (1954)). therefore, although the superior court quashed that juvenile's appeal as interlocutory, the court stressed that it may not have such power in the future should the courts continue to extend adult procedural rights under the "fundamental fairness" doctrine to juvenile proceedings. See id.

The juvenile G.G. argues, however, that the recent amendments to the Juvenile Act have transformed the nature and function of the Pennsylvania juvenile system to such an extent that the prohibition against jury trials is violative of due process rights. The juvenile argues that these amendments have created a system which now imposes upon juveniles further consequences of criminal behavior but still refuses to afford the juvenile the full panoply of constitutional protections long since accorded their adult counterparts. In light of these amendments, he argues that continuing to deny him a jury trial denies him due process under the standard of "fundamental fairness" set forth in In re Gault, 387 U.S. 1(1967).

In support of the juvenile's request for a jury trial, the juvenile specifically cites the following recent statutory changes: First, the purpose of the Act as amended provides that juvenile dispositions must serve the purposes of protection of the community and imposition of accountability, 42 Pa. C.S.A. § 6301 (b)(2) (Supp. 1996), and no longer includes removing juveniles from the consequences of criminal behavior. 42 Pa.C.S.A. §

6301(b)(2) (Purdon 1982). Therefore, the amended act supports a more punitive, rather that rehabilitative, philosophy.

Second, the new law no longer excludes the general public from all delinquency proceedings. 42 Pa.C.S.A. § 6336(d) (Purdon 1982). New section 6336(e) opens certain juvenile court proceedings to members of the general public under a broad array of circumstances.[1] The juvenile argues, therefore that it now is a "public trial," eradicating one of the reasons that the Supreme Court refused to grant the juvenile a right to a jury trial in McKeiver (the Court's concern that injecting the jury trial into the juvenile proceeding would possibly bring with it the public trial). 403 U.S. at 550.

Third, new Section 6341(b) requires that after a child is adjudicated delinquent, the name, address, description of the delinquent acts, and the disposition of any case be disclosed to the school principal where the juvenile is enrolled. 42 Pa.C.S.A. § 634(b.1). If the child is adjudicated for acts which constitute a felony, the court provides the principal information pertaining to the adjudication, the juvenile's prior delinquent history, and the court's supervision plan. The court has the authority to provide the school principal any further relevant information that the court deems necessary to protect the public safety or to further the goals of treatment, supervision, or rehabilitation of the delinquent child. Id.

Fourth, prior to the statutory amendments, all juvenile

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[1] The Act now provides that the general public shall not be excluded from hearings in any case involving a juvenile fourteen years of age or older who is charged with an offense that would be considered a felony if committed by an adult. Furthermore, the public shall not be excluded from delinquency hearings where the child was twelve years of age or older at the time of the alleged offense and the offense was one of the following: murder; voluntary manslaughter; aggravated assault of the first degree; arson of the first degree; involuntary deviate sexual intercourse; kidnaping, rape, robbery of the first degree; robbery of motor vehicle; or an attempt or conspiracy to commit any of these offenses.

court records and files were available only to the court and its staff for use in preparing a pre-sentence report in criminal case where the juvenile was convicted of a felony and who had, prior thereto, been adjudicated delinquent. 42 Pa.C.S.A. § 6307 and § 6354 (Purdon 1982). The amended Act now provides that "orders of delinquency adjudications and dispositions and petitions relating thereto, orders resulting from disposition review hearings and histories of bench warrants and escapes" are open to inspection by a judge or issuing authority for use in determining bail. 42 Pa.C.S.A. § 6307 (Purdon Supp. 1996). The use of the disposition of a child under the Act, for the purposes of a presentence investigation and report, is no longer limited to convictions of felonies and may now be used in the preparation of a presentence report following any subsequent criminal conviction. 42 Pa.C.S.A. § 6354(b)(1) (Purdon Supp. 1996). The Act as amended also provides that the disposition of a child under the Act may be used in a criminal proceeding where such evidence, if committed by an adult, would be admissible. 42 Pa.C.S.A. § 6354(b)(4)(Purdon Supp. 1996).

Finally, the juvenile argues that should the court adjudge him delinquent in this matter, he would then have "an automatic pass to criminal court upon his next felony arrest" which would expose him to the criminal process "without ensuring that the predicate felony adjudication was obtained in a proceeding that comports with all the requirements of due process." Numerous additional juveniles and certain criminal offenses are now directly filed for prosecution in adult criminal court. 42 Pa.C.S.A. § 6302 (Purdon Supp 1996). Therefore, as a matter of "fundamental fairness," the juvenile argues he has a constitutional right to trial by jury in these proceedings to ensure they comport with due process.

Despite the juvenile's arguments that he should be granted a jury trial, this court does not agree that the amendments to the Juvenile Act have so radically transformed the nature and the function of the juvenile courts as to require a jury trial in order to comport with due process. First, even though the Supreme Court in McKeiver did not find that a juvenile had a constitutional right to a jury trial and left the issue for individual states to decide, as of 1994, only about one-third of the states grant this privilege to its

juveniles. See Koine L. Larsen, Comment, With Liberty and Juvenile Justice For All: Extending the Right To a Jury Trial To The Juvenile Courts, 20 Wm. Mitchell L. Rev. 835, 856 (1994). Furthermore, several other states have also amended their juvenile statutes to reflect a more punitive philosophy and are also faced with a juvenile court system that procedurally resembles their criminal court system; yet, these states' courts do not believe that "fundamental fairness" requires juveniles be given the right to a jury trial. See id. at 863, 866. Similarly, in this case, although the juvenile is correct that the purpose of the Juvenile Act has changed from an emphasis on rehabilitation of the juvenile to now include protection of the community and the imposition of accountability, and although procedurally the juvenile system may now more closely resemble the criminal court system, the juvenile court proceedings are not so similar to criminal court as to warrant expanding the juvenile's due process rights to include the right to a jury trial.

The juvenile's argument that he is entitled to a jury trial, because a court can use a prior juvenile adjudication to determine a sentence in the future, also fails. The Pennsylvania Superior Court has determined that even though a juvenile did not have a jury trial during a prior juvenile adjudication, use of that adjudication for future sentencing did not violate the offender's right to due process. Commonwealth v. Presley, ___Pa. Super. ___, 686 A.2d 1321 (1996).

Next, the juvenile also cites a California Court of Appeals case upholding a juvenile's right to a jury trial after its legislature had adopted very similar amendments to its juvenile act. In re Javier, 206 Cal. Rptr. 386 (1984). The rationale of the Javier court at first seems persuasive, because the California and Pennsylvania amendments are so similar; however, not only did another division of the California Court of Appeals that same year disagree with the views in Javier and find that a juvenile did not have a right to jury trial, see In the Matter of Stephen L., 208 Cal. Rptr. 453 (1984), but the California Court of Appeals has recently upheld this finding that "juveniles enjoy no state of federal due process or equal protection right to a jury trial in delinquency proceedings." California v. Graham, 1997 WL 141440, *3 (Cal.App. 5 Dist. March 28, 1997).

Finally, the United States Supreme Court, in separate appeals from the ninth and eleventh circuits, recently denied certiorari on this issue. By denying certiorari, the Court not only upheld the circuit courts' reliance on McKeiver that due process does not require a jury trial in juvenile adjudications, but the denial of certiorari also upheld the circuit courts' determinations that a court's use of a prior juvenile adjudication in the future for the purpose of criminal sentencing does not violate the offender's rights to due process. McCullough v. Singletary, 967 F.2d 530, 532, 535 (11th Cir. 1992), cert. denied 507 U.S. 975 (1993); U.S. v Williams, 891 F.2d 212, 214-215 (9th Cir. 1989), cert. denied, 494 U.S. 1037 (1990)

The Juvenile Court exists to remove the juvenile from criminal court so that the juvenile will not be subject to punishment as the consequence of his criminal behavior but will have the opportunity for rehabilitation. See In the Interest of G.T., 409 Pa. Super. 15, 597 A.2d 638, 641 (1991). Even though the purpose of the amended Juvenile Act supports a more punitive philosophy, the goal of the Juvenile Act still remains "to provide for the care, protection, and wholesome mental and physical development of children coming within [this Act]." 42 Pa. C.S.A. § 6301 (Purdon 1982 and Supp. 1996). In order to provide for the "supervision, care and rehabilitation" of the juvenile, the legislature has specifically stated that "[h]earings under this chapter shall be conducted by the court without a jury, in an informal but orderly manner." 42 Pa. C.S.A. § 6336 (Purdon Supp. 1996). Furthermore, our Superior Court has previously held that because "a juvenile proceeding is not a criminal prosecution within the guarantees of the Federal Constitution[, j]uveniles . . . do not have an absolute right to all constitutional safeguards developed to protect those accused of crimes." Pennsylvania v. Mitchell, 283 Pa. Super. 455, 424 A.2d 897, 900 (1981), cert. denied 454 U.S. 851 (citing McKeiver, 403 U.S. 528 (1971)). Therefore, this court finds that by not extending the right to a jury trial in juvenile adjudications, the juvenile is not denied due process under the standard of "fundamental fairness" set forth in Gault.

Equal Protection

Although the juvenile states in his Memorandum of Law that the juveniles' right to a jury trial is based upon the Equal Protection Clause of the Fourteenth Amendment and Article 1, section 9 of the Pennsylvania Constitution, the juvenile has failed to establish how the legislature, through the Juvenile Act, has singled a certain group to further an illegitimate state purpose and has also failed to show how the Act is not rationally related to the ends the legislature is trying to achieve.

Accordingly, the court enters the following:

ORDER

And NOW this 25th day of April 1997, the juvenile's motion for a jury trial is hereby DENIED

BY THE COURT

/s/ J. Turgeon
JEANNINE TURGEON, JUDGE

Rebecca J. Margerum, Esq., - Public Defenders Office
Eric R. Augustine, Esq., - District Attorney's Office